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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/620,038	07/15/2003	Justin Shimek	6126US	7511
30173	7590	03/07/2006	EXAMINER	
GENERAL MILLS, INC. P.O. BOX 1113 MINNEAPOLIS, MN 55440			MAHAFKEY, KELLY J	
			ART UNIT	PAPER NUMBER
			1761	
DATE MAILED: 03/07/2006				

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b> 10/620,038	<b>Applicant(s)</b> SHIMEK ET AL.	
	<b>Examiner</b> Kelly Mahafkey	<b>Art Unit</b> 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-78 is/are pending in the application.  
     4a) Of the above claim(s) 40-78 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-39 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
     Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
     Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
     a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |   |  |
|---|--|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. ____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)  | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)            |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date <u>12/15/03</u> . | 6) <input type="checkbox"/> Other: ____  |

**DETAILED ACTION**

***Election/Restrictions***

1. Restriction to one of the following inventions is required under 35 U.S.C. 121:

I. Claims 1-39, drawn to an aerated confection, classified in class 426, subclass 564.

II. Claims 40-79, drawn to a method for making an aerated confection, classified in class 426, subclass 443.

The inventions are independent or distinct, each from the other because:

2. Inventions II and I are related as process of making and product made. The inventions are distinct if either or both of the following can be shown: (1) that the process as claimed can be used to make another and materially different product or (2) that the product as claimed can be made by another and materially different process (MPEP § 806.05(f)). In the instant case the product as claimed can be made by another and materially different process; the product as claimed does not require extrusion.

3. Because these inventions are independent or distinct for the reasons given above and have acquired a separate status in the art in view of their different classification, restriction for examination purposes as indicated is proper.

4. During a telephone conversation with John OToole on February 6, 2006 a provisional election was made with traverse to prosecute the invention of Group I, claims 1-39. Affirmation of this election must be made by applicant in replying to this Office action. Claims 40-79 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

***Claim Rejections - 35 USC § 112***

5. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

6. Claims 26, 27, 30, and 31 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

7. Claim 26 recites the limitation "the food product of claim 26". There is insufficient antecedent basis for this limitation in the claim. The claim refers to itself. For the purpose of prior art comparison, the examiner will consider the claim as reciting "the food product of claim 25".

8. Claim 30 recites the limitation "the food product of claim 30". There is insufficient antecedent basis for this limitation in the claim. The claim refers to itself. For the purpose of prior art comparison, the examiner will consider the claim as reciting "the food product of claim 29".

9. Claim 27 is rejected because it is dependent upon claim 26.

10. Claim 31 is rejected because it is dependant upon claim 30 and because Claim 31 recites the limitation "the food product of claim 31". There is insufficient antecedent basis for this limitation in the claim. The claim refers to itself. For the purpose of prior art comparison, the examiner will consider the claim as reciting "the food product of claim 30".

***Claim Rejections - 35 USC § 103***

11. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

12. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

13. Claims 1-36 and 38 are rejected under 35 U.S.C. 103(a) as being unpatentable over Zietlow et al. (US 6207216 B1) in view of Igoe (Dictionary of Food Ingredients, 4<sup>th</sup> Edition).

14. Zietlow discloses an dried soft aerated confection in the form of pieces comprising: about 65% to 98% of a saccharide component dry weight basis; about 0.5 to 30% of a structuring agent; about 1% to 6% moisture; and, about 1% to 5% of a whipping or foaming protein based agent having at least one color, a moisture content of about 1% to 25%, (see Column 2 lines 25-45 and 64, Column 3 line 54, Column 4 lines 1-20, and claims 1-3). Zietlow discloses that the structuring agent is gelatin or guar gum (see Column 4, lines 1-11). Zietlow discloses that the density ranges from 0.15 g/cc to 0.30 g/cc (see Column 4, lines 37-42). Zietlow discloses that the major part of

the saccharide component should be sucrose and that the moisture ranges from 1 to 8% (see Column 3, lines 65-68, Column 4, lines 35-38 and claim 3). Zietlow discloses the food product admixed with a ready-to-eat breakfast cereal (see Abstract). Zietlow also discloses the following other properties of the aerated food product:

- a. That the dried soft aerated confection can have a fat content of less than 5% (see Column 5, lines 7-10).
- b. That the food product is shaped and has a weight per piece of about 0.15 to 5 grams (see Column 5, lines 30-36).
- c. That the confection can form a topical coating completely surrounding a second confection (see Column 7 lines 50-57 and claim 26).
- d. That the confection can be in the form of a portion of a composite food product (Column 2 lines 47-67 and Column 7 lines 45-57).
- e. That the food product is in the form of a wafer having a thickness of about 1 to 5 mm (see Column 5, lines 36-47 and claims 18 and 19).
- f. That the aerated food product portions are in the form of peripheral borders (see claims 20 and 21).
- g. That the aerated food product portion is in the form of core (see claim 22).
- h. That the aerated food product is additionally calcium fortified in the range of 0.15% to 10% (see Column 5, lines 1-6 and Column 4, lines 57-68).
- i. That the aerated food product additionally includes at least one vitamin (Column 7 lines 58-61).

- j. That the aerated food product has at least two phases characterized by different colors (Figure 1 and Column 5 lines 23-30).
  - k. That the aerated food product can be mixed with a second dry food in particulate form, including an RTE breakfast cereal (Column 7 lines 35-57).
  - l. That the aerated confection can additionally comprise of a high potency sweetener (Column 4 lines 46-51).
  - m. That the aerated confection can be admixed into a bar form (Column 7 lines 50-56).
15. Zietlow, however, is silent to the aerated confection as containing a softening agent as recited in claims 1, 2, 8, 12, and 14, to the affects of the softening agent as recited in claims 1, 5, 7, and 32, to the water activity of the aerated confection as recited in claims 1 and 13, to a specific type and amount of high potency sweetener as recited in claims 34 and 35, and to the foaming and structuring agent as gelatin as recited in claim 6.
16. Regarding the aerated confection as containing a softening agent as recited in claims 1, 2, 8, 12, and 14, Igoe teaches of that glycerin (a softening agent) can be added to marshmallows (i.e. aerated confections). Igoe teaches that glycerin keeps foods from drying out and moisture migration into cereals. Igoe teaches that glycerin is also used in confections to maintain the initial level of crystallization of sugar. Refer specifically to pages 66 and 67. It would have been obvious to one of ordinary skill in the art at the time the invention was made to include an amount of glycerin in the aerated confection depending on the moisture content of the aerated confection and the

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moisture content of the cereal that it was to be packaged with. Because Igoe is a dictionary of food ingredients and teaches that glycerin is commonly added to confections and is used to prevent the migration of moisture to cereal and Zietlow teaches of a confection, which can be utilized in cereals, one would have a reasonable expectation of success from the combination.

17. Regarding the affects of the softening agent as recited in claims 1, 5, 7, and 32, Igoe teaches that glycerin is also used in confections to maintain the initial level of crystallization of sugar. Refer specifically to pages 66 and 67. Because it would have been obvious to add a softening agent to the aerated confection as taught by Zietlow and as discussed above in view of Igoe, thus creating the same composition as claimed by applicant, the aerated confection as taught by Zietlow in view of Igoe, would possess a glass transition temperature of less than 5C as recited in claims 1 and 5, would have the ability of a 500 cm cubed quantity to compress to 50-85% of its original volume in 5 minutes due to the force imparted by a 1 kg weight as recited in claim 7, and would have a springback of 15% of the lost volume within 5 minutes as recited in claim 32.

18. Regarding a specific type and amount of high potency sweetener as recited in claims 34 and 35, Igoe teaches that sucralose is a high intensity sweetener which is commonly used in confectionary products. Igoe teaches that the sucralose has 0 calories and is 600 times as sweet as sugar with a similar flavor profile. Igoe teaches that it is heat stable, readily soluble, and maintains its stability at elevated temperatures. It would have been obvious to one of ordinary skill in the art at the time the invention was made to include sucralose in the aerated confection as disclosed by



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Zietlow. One would have been motivated to do so because of the benefits of sucralose, such as it would provide a lower-calorie sugar free product, it is 600 times as sweet as sugar with a similar flavor profile, heat stable, readily soluble, and maintains its stability at elevated temperatures. It would have been further obvious to one ordinary skill in the art to include sucralose in any amount depending on the desired level of sweetness in the final product. Because Igoe is a dictionary of food ingredients and teaches that sucrose is commonly added to confections and is used as a high potency sweetener and Zietlow teaches of a confection, which can include a high potency sweetener, one would have a reasonable expectation of success from the combination.

19. Regarding the water activity of the aerated confection as recited in claims 1 and 13, marbits or marshmallow products (i.e. aerated products), which are utilized for cereals would be, expected to possess a water activity of 0.1 to 0.4 (See Borek et al. (US 5695805) Abstract, Column 5 lines 65-67 and Column 6 lines 1-15).

20. Regarding the foaming and structuring agent as gelatin as recited in claim 6, Zietlow teaches of gelatin as structuring agent (see Column 4, lines 1-11). It would have been obvious to one of ordinary skill in the art at the time the invention was made to include any foaming and/or structuring agent depending on the cost of the agent or agents at the time the invention was made.

21. Claims 37 and 39 are rejected under 35 U.S.C. 103(a) as being unpatentable over Zietlow in view of Igoe as applied to claims 1-36 and 38 above, and further in view of Gajewski, US patent number (US 4,251,561).

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22. Zietlow in view of Igoe and Borek disclose all of the features of the instantly claimed invention, including the aerated confection in bar form, except for what Bloom strength of gelatin to use as recited in claim 37.

23. Gajewski teaches an aerated confection comprising gelatin (see Abstract). Gajewski teaches that the bloom strength of the gelatin used should be between 150 and 300 with the best results being obtained between 250 and 300 (which would include the instantly claimed bloom of 250) (see Columns 4, lines 49-68 and Column 5, lines 1-18).

24. It would have been obvious to one of ordinary skill in the art at the time of the invention to have used the bloom strength as taught by Gajewski for the gelatin of Zietlow since that bloom strength is taught as being the best for aerated confection applications and since a high bloom strength gelatin will yield a product that is lighter and more frangible and best suited for ready-to-eat cereal applications (see Column 5, lines 1-29).

### ***Conclusion***

25. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kelly Mahafkey whose telephone number is (571) 272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

26. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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27. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Handwritten signature of Kelly Mahafkey, dated 3/2/02.

Kelly Mahafkey  
Examiner  
Art Unit 1761

Handwritten signature of Keith Hendricks.

**KEITH HENDRICKS**  
**PRIMARY EXAMINER**